



Response to the Draft Report of the Productivity Commission on the Workplace Relations Framework

18 September 2015

NFF Member Organisations



Australian Chicken Growers' Council Ltd



CANEGROWERS



CORPORATE
AGRICULTURAL
GROUP



Goat Industry Council
of Australia Inc.

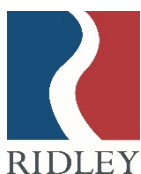


NEW SOUTH WALES
IRRIGATORS'
COUNCIL

*The Pastoralists'
Association of
West Darling*



RICEGROWERS' ASSOCIATION
OF AUSTRALIA INC



WOOLPRODUCERS
AUSTRALIA



The National Farmers' Federation (NFF) is the voice of Australian farmers.

The NFF was established in 1979 as the national peak body representing farmers and more broadly, agriculture across Australia. The NFF's membership comprises all of Australia's major agricultural commodities across the breadth and the length of the supply chain.

Operating under a federated structure, individual farmers join their respective state farm organisation and/or national commodity council. These organisations form the NFF.

The NFF represents Australian agriculture on national and foreign policy issues including workplace relations, trade and natural resource management. Our members complement this work through the delivery of direct 'grass roots' member services as well as state-based policy and commodity-specific interests.

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Statistics on Australian Agriculture

Australian agriculture makes an important contribution to Australia's social, economic and environmental sustainability.

Social >

There are approximately 115,000 farm businesses in Australia, 99 percent of which are family owned and operated.

Each Australian farmer produces enough food each year to feed 600 people, 150 at home and 450 overseas. Australian farms produce around 93 percent of the total volume of food consumed in Australia.

Economic >

The agricultural sector, at farm-gate, contributes 2.4 percent to Australia's total Gross Domestic Product (GDP). The gross value of Australian farm production in 2013-14 was \$51 billion – a 6 percent increase from the previous financial year.

Yet this is only part of the picture. When the vital value-adding processes that food and fibre go through once they leave the farm are added in, along with the value of all economic activities supporting farm production through farm inputs, agriculture's contribution to GDP averages out at around 12 percent (over \$155 billion).

Workplace >

The agriculture, forestry and fishing sector employs approximately 323,000 employees, including owner managers (174,800) and non-managerial employees (148,300).

Seasonal conditions affect the sector's capacity to employ. Permanent employment is the main form of employment in the sector, but more than 40 per cent of the employed workforce is casual. Almost 10 per cent of all workers are independent contractors and more than 50 per cent of farmers are self-employed owner-managers.

Approximately 60 per cent of farm businesses have less than 5 employees. More than 50 per cent of farm businesses have no employees at all.

The sector is largely award-reliant. Enterprise bargaining is not widespread: in March 2015, there were only 134 current enterprise agreements covering a total of 6,800 employees in the agriculture, forestry and fishing sector.

Environmental >

Australian farmers are environmental stewards, owning, managing and caring for 52 percent of Australia's land mass. Farmers are at the frontline of delivering environmental outcomes on behalf of the Australian community, with 94 percent of Australian farmers actively undertaking natural resource management.

The NFF was a founding partner of the Landcare movement, which in 2014, celebrated its 25th anniversary.

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Executive Summary

Thriving in an increasingly global and competitive marketplace requires the ability to adapt as things change. Agricultural productivity rates have stalled over the last decade.¹ Undue restraints on business decision-making impede growth and innovation, while complexity drives up compliance costs. These issues need to be addressed to support the future competitiveness of the agriculture sector and the Australian economy.

This submission outlines the NFF's response to the recommendations of the Productivity Commission in its draft report on the Workplace Relations Framework. Overwhelmingly, we support the draft recommendations. In some areas, we have made minor suggestions to improve the effectiveness of the recommendations. On other issues, we have sought to provide additional information to assist the Commission in its deliberations, in response to its specific requests.

While the recommendations will not dramatically alter the workplace relations landscape, they will make important improvements to support greater capacity in the Australian economy.

We look forward to reading the Commission's final report.

¹ Keogh, M *Why has Australian agriculture productivity growth stalled?* 1 September 2015
http://www.farminstitute.org.au/blog/Ag_Forum/post/australian-agriculture-productivity-stall/

1. Introduction

The NFF welcomes the opportunity to comment on the Productivity Commissions' draft report on the Workplace Relations Framework. In a submission to the Agricultural Competitiveness White Paper, the NFF called for an independent, economic assessment of the *Fair Work Act 2009* (FW Act) and associated regulations. The review is an important opportunity to shift debate in Australia to reforms that will drive Australia's future competitiveness.

As the Productivity Commission notes, Australia's workplace relations system is not systematically dysfunctional, but it is in need of reform. Employment is highly regulated in Australia. Modern awards are increasingly expanding the minimum safety net of terms and conditions of employment and while enterprise bargaining is not widespread in many industries. Processes are overly complex and in many cases the triumph of form over substance is leading to much higher stakeholder costs than is necessary to achieve fair and reasonable outcomes.

Even small regulatory adjustments can make a large difference in overall productivity if appropriately targeted. Workplace reform must be achievable in the Australian context if we are to remain competitive on the global stage. In the agriculture sector, there is no time like the present to embrace reforms that will allow Australian farmers to capitalise on the significant opportunities ahead. Ensuring that they have the capacity to manage their businesses effectively, efficiently, and without undue administrative process will support job creation and growth, for the benefit of all Australians.

2. Institutions

A new Minimum Standards Division of the Fair Work Commission

The NFF supports draft recommendations 3.1 and 12.2.

Consideration of minimum wages and related factors should be permitted outside of the modern award reviews, particularly if recommendation 12.1 to abandon the four yearly review is enacted. This is necessary to ensure that change is made where it is needed. Such change should be guided by empirical evidence.

Any new approach to the review and establishment of minimum employment standards should clearly define the limits of discretion conferred upon the Fair Work Commission (**Commission**), to ensure procedural fairness while encouraging industry competitiveness and growth.

Experience in the modern awards review highlights the lack of clarity now present in relation to how the functions of the Commission are carried out, and the scope of its discretion. The shift away from resolution of industrial disputes, limited in scope by the ambit of claims made between the parties, to a regulatory-style review, suggests the need for a new process for managing stakeholder engagement to ensure procedural fairness.

The current process, which has evolved over many years, involves parties bringing forward claims, directions for the filing and serving of evidence and submissions, followed by hearings and a decision. This process does not fit well with a regulatory review which provides for adjustment of modern awards in any manner considered appropriate, unconstrained by the evidence and submissions before it. There are important implications for procedural fairness if regulatory change is adopted without stakeholders having had an opportunity to influence the outcome having regard to circumstances in their industry. In this context, it is worth noting that decisions to adjust modern awards and minimum wages cannot be revoked.²

A new appointments process

The NFF supports draft recommendation 3.2. As noted in our initial submission, the Commission suffers from perceptions of bias (whether founded or not) and this

² The Commission must not vary or revoke a decision dealing with modern awards or minimum wages - section 603(3) of the *Fair Work Act 2009*.

has implications for its credibility as an institution. Recent focus on the long period of leave of a serving Vice President highlights the difficulty of dealing with situations where there may be a valid reason for separation, but no statutory basis to achieve it.

The model currently applied under the *Australian Human Rights Commission Act 1986*, where members of the Commission can be appointed for 7 year terms and are eligible for re-appointment, may provide a useful reference point.

We would caution against too much emphasis on performance management during the term of appointment. While sound in principle, the practical reality is that such processes are fraught, severely distracting and can result in years of litigation and wasted resources.

3. National Employment Standards

Long Service Leave

In our previous submission, NFF called for the adoption of a national long service leave standard to reduce complexity and costs. We remain of the view that a national uniform standard is desirable, to simplify the regulatory regime and improve understanding across the country.

Before 2009, long service leave entitlements were determined by State and Territory legislation. Federal enterprise agreements could displace State long service leave laws to the extent of inconsistency.³ This meant that national employers could simplify their obligations in relation to long service leave by implementing a single national long service leave regime for their employees across Australia. The following table shows the number of enterprise agreements containing long service leave provisions immediately before commencement of the FW Act.

Current at 30 Jun 2009	Agreements	%Agreements	Employees	%Employees
Agriculture, forestry and fishing	41	10.2%	1533	12.9%
All agreements	4434	19.9%	670678	32.7%

Department of Employment, *Workplace Agreements Database*, 4 March 2015.

The fact that one in five enterprise agreements, covering more than 30 per cent of employees, adopted a national long service leave regime suggests a value proposition for business in the arrangement. Regrettably, the FW Act reversed the approach to long service leave in federal workplace arrangements, by making enterprise agreements operate subject to State and Territory long service leave laws.⁴ As a result, it is no longer possible for employers to streamline their processes on the issue by implementing a national long service leave regime.

Business is at the mercy of federal and State government relations, awaiting agreement through the Council of Australian Governments on the progression of a

³ Section 109 of the Constitution.

⁴ This is achieved through the combined effect of sections 26, 27 and 29 of the FW Act.

national long service leave standard. The lack of progress on this initiative to date suggests that the perceived difficulty of the task is a significant barrier.

A portable long service leave scheme?

The NFF does not support a uniform national portable long service leave scheme. In our view, such a scheme is in tension with the underlying purpose of long service leave (that is, to enable a worker to enjoy the reward of leave for long service with an employer, so that the worker can return to work refreshed and reinvigorated).⁵ It will also increase costs for employers who become liable for a long service leave contribution for all employees, no matter how long their period of service. As noted in the draft report, current arrangements provide for employees to accrue long service leave over a period of service, with the entitlement crystallising only after a minimum period of employment.

The simplest way to minimise the transaction costs associated with long service leave is to provide for a loading in lieu of such leave (as was the approach to dealing with entitlements for casual employees before the FW Act prohibited modern awards from dealing with long service leave). The higher cost to business would be at least partially offset by lower administrative and replacement costs over time.

INFORMATION REQUEST

The Productivity Commission seeks information on whether it would be practical for casual workers to be able to exchange part of their loading for additional entitlements (for example personal or carer's leave) if they so wish, and whether such a mechanism would be worthwhile.

It is not clear to the NFF that there is a case for changing the way casual employment is administered in Australia. The recent Productivity Commission Staff Working Paper on Forms of Work in Australia revealed that the rapid growth of casual employees, labour hire workers and independent contractors in previous decades has not continued in recent years.⁶ Over the decade leading up to 2011,

⁵ Australian Industrial Relations Commission *Printing Industry Long Service Leave case*, R0353 (24 December 1998)

⁶ Anthony Shomos, Erin Turner and Lou Will, *Forms of Work In Australia*, Productivity Commission – Staff Working Paper April 2013, p39.

only the prevalence of permanent employment was higher at the end of the decade than at the start.⁷

The difference between entitlements for casual and permanent employees necessarily reflects the difference in these types of employment, and need for flexibility in relation to casual employment. Payment in lieu of annual and sick leave entitlements is appropriate where there is no expectation of ongoing employment and/or where a simple, easy to administer transaction is paramount.

In our view, complicating the arrangement by facilitating different arrangements for individual employees in the same workplace will increase the already significant administrative load required for workforce management. It will mean varying permutations of casual arrangements in a given workforce and over time will encourage claims provision of both leave and loadings for casual employees (rather than one or the other).

⁷ Ibid.

4. Unfair Dismissal

The NFF supports recommendations 5.1 – 5.3 of the draft report.

As the draft report notes, a higher number of unfair dismissal claims are made to the Commission each year than any other type of claim. Appeals to unfair dismissal decisions are becoming increasingly common: in 2013-14, there were 79 appeals against unfair dismissal decisions, representing a 36 per cent increase from the previous year.⁸ Appeals were dismissed in 62 per cent of matters.⁹ As we noted in our initial submission, there are some features of the current unfair dismissal framework that require review.

One of the most significant concerns with the current unfair dismissal framework is ‘go away money.’ In most cases involving unfair dismissal, relationships break down and trust is destroyed. Parties then face a choice between long, expensive and potentially embarrassing hearings or a quick and confidential settlement equivalent to the average amount of compensation awarded in proceedings of this kind. A legislative focus on reinstatement will not overcome concerns about ‘go away money’ – in 2013-14, there were 14,648 unfair dismissal claims dealt with by the Commission.¹⁰ Of these, 150 claims resulted in an award of compensation while only 34 reinstatement orders were made.¹¹ 67 per cent of claims were resolved for an amount of compensation of less than \$15,000.¹²

Greater consideration of applications ‘on the papers’, with a focus on the merits of the respective claims, and undertaken before conciliation, will help to reduce the incidence of ‘go away money’. Ordinarily, go away money is the product of one or more conferences between the parties. Resolving unmeritorious claims before this forum is convened will reduce party participation costs and narrow opportunities for settlements that are less expensive than the likely costs of arbitration (a common outcome which pays no regard to the merits of the claim in question).

The NFF strongly supports the recommendations to narrow the remedies available for unfair dismissal. Where there is a valid reason for dismissal, employers should

⁸ FWC Annual Report 2013-14, p42.

⁹ FWC Annual Report 2013-14, p42.

¹⁰ FWC Annual Report 2013-14, p125.

¹¹ FWC Annual Report 2013-14, p127-8.

¹² FWC Annual Report 2013-14, p127-8.

be entitled to respond accordingly, despite a defect in process adopted when they do. This is particularly the case where there is no obvious detriment to the employee from a failure to follow procedural requirements over and above that which would have resulted from the dismissal. Many employers have attempted to follow proper process in the dismissal context, only to fail when, with the benefit of hindsight, procedural fairness errors are identified.

Given that where unfair dismissal has occurred, relationships generally break down and trust is destroyed, reinstatement is an inappropriate remedy in a significant number of unfair dismissal cases. As the draft report notes, reinstatement occurs rarely in practice.¹³ In particular, it is often more difficult to reinstate an employee into a small business rather than a larger firm.

The NFF does not support draft recommendation 5.4.

Depending on how it is defined, small business comprises approximately 80% of the agriculture, forestry and fishing sector.¹⁴ The Small Business Fair Dismissal Code plays an important role in making a very difficult process manageable for small business. It provides a pathway to compliance and simplifies the process for termination of employment. In our view, any practical difficulties associated with the Code could be resolved through revisions to the layout and content of the document and any associated guidance material.

INFORMATION REQUEST

The Productivity Commission seeks further views on possible changes to lodgement fees for unfair dismissal claims.

In our view, a more effective way to dampen enthusiasm for unfair dismissal claims would be greater focus on the prospect of costs being payable in the early stages of the process. Higher lodgement fees affect all claimants, not just those making claims that are hotly contested.

While costs do not ordinarily follow the event in the unfair dismissal context, they are payable in limited circumstances, including where a claim is made vexatiously or where there are no reasonable prospects of success.¹⁵ The FW Act and Rules¹⁶

¹³ Productivity Commission Draft Report, 235

¹⁴ *Australian Small Business: Key Statistics and Analysis*, Australian Government, December 2012.

¹⁵ FW Act, s400A and s611.

¹⁶ FW Act, section 404 and FW Rules, r.16

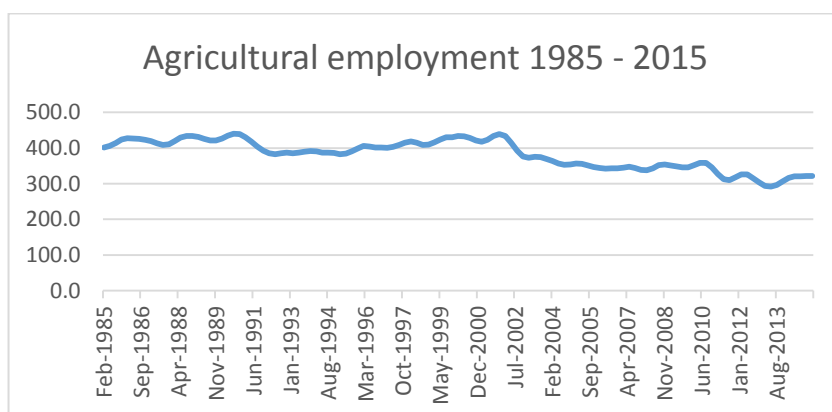
also provide for security for costs, although the provisions are not commonly used. Drawing attention to these provisions at the outset of the claims management process may well encourage the parties to focus on their respective prospects of success (and potential liability) before significant resources are expended.

5. Variations in uniform minimum wages

The NFF supports recommendation 9.1.

The ability to respond to requests for temporary variations in award wages on exceptional circumstances grounds after an annual wage review has been completed is important, even if it is rarely used.

Australia is currently experiencing its third severe drought in 15 years. Attempts to gain relief from wage increases for drought affected areas have rarely been successful, often because of limited evidence to demonstrate the direct economic impact of increased wages on employment levels. And yet major droughts over the past decades have contributed to sharp drops in employment in the agriculture sector, with limited evidence of recovery in numbers after that time. There were 356,600 people employed in agriculture, forestry and fishing at the beginning of 2005. By 2015, this figure had fallen to 321 300.



The proposed approach would provide greater flexibility to address situations that are beyond the control of the parties and which can arise at any time.

INFORMATION REQUEST

The Productivity Commission seeks information on whether the structure of junior pay rates should be based on a model other than age, such as experience or competency, or some combination of these criteria.

There is considerable benefit in retaining entry-level wages for young workers, to encourage job creation for the inexperienced or low skilled job seekers.

The NFF accepts the value proposition that junior wages ought to account for both age and experience. In our view, most modern awards already do this through the

combined effect of wage rates and classification structures aligned to level of skill and experience of the employee.

For example, the Pastoral Award 2010 outlines employee classifications based on their level of experience and the nature of their work.¹⁷ Junior wages in this industry are calculated as a percentage of the adult wage for the relevant classification under which they fall.¹⁸ For example, a junior who is 17 years of age and falls within the classification ‘farm and livestock hand level 3’ as a station hand with, among other things, at least 12 months experience in the industry will be entitled to a minimum wage of \$454.51 per week, whereas a 17 year old falling within classification level 1 as having among other things, less than 12 months experience in the industry, would be entitled to a minimum wage of \$435.54 per week.

Similarly, the Horticulture Award 2010 provides for various classification levels according to experience in the industry, training and responsibilities.¹⁹ Minimum wages for juniors are calculated as a percentage of the adult wage for the employee classification in which they fall.²⁰

The system in New Zealand whereby the ‘starting out wage’ applies to employees who, among other things, have not yet completed six months of continuous employment with their current employer, would drive up labour costs in the Australian context. The New Zealand system provides for all junior employees to be paid the full adult rate after six months of continuous employment. This is in contrast to the tiered approach provided for in most modern awards, where wages increase gradually according to a combination of factors including age, skill and experience.

Australia’s apprenticeship and traineeship arrangements

The NFF supports draft recommendation 9.2.

A comprehensive review into Australia’s apprenticeship and trainee arrangements is a welcome initiative. There has been a reduction between 30 and 35% in the uptake of apprenticeships and traineeships in NSW and similar trends can be

¹⁷ Clause 27.

¹⁸ Clause 28.2.

¹⁹ Schedule B.

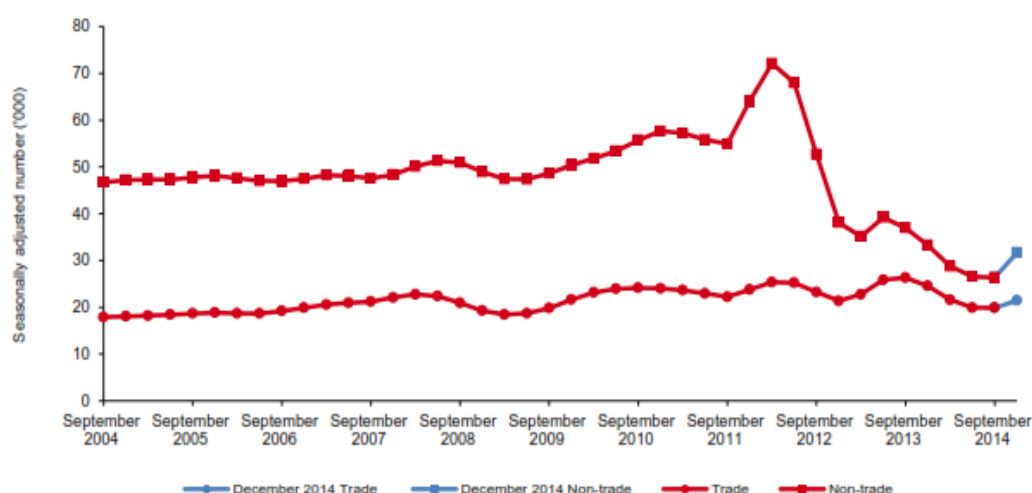
²⁰ Clause 16.1.

applied across the country, and broadly across all industries. These figures suggest that there are a number of barriers to the uptake of apprenticeships and traineeships in Australian agriculture.

The joint Commonwealth and State funded training system has experienced continual change over many years, as well as funding reductions and fewer incentives for employees to undertake training. Together, these factors create confusion and uncertainty over the nature of programs and the availability of training options. Changes to service providers, such as contractual changes, KPI changes and funding reductions, can minimise the quality of service provided by the organisation.

For employers, the cost of employing apprentices can be a major disincentive. Following a decision in August 2013 to lift apprenticeship wages²¹, the number of apprentice and trainee commencements rates declined, as the table below shows. While the trend appears to have stabilised, this demonstrates how wage-based

Figure 1 Trade and non-trade commencements, seasonally adjusted, September 2004 – December 2014



decisions can affect decisions to invest in skills.

Australian Government NCVER *Apprentices and Trainees Early Trend Estimates December 2014*

For some employers, the extra workload involved in training a young person may outweigh the benefit received from having an extra pair of hands. The demand for permanent labour on many farms in Australia is relatively low because of the

²¹ Fair Work Commission *Transitional Review of Modern Awards —Apprentices, Trainees and Juniors: Common Claims* AM2012/135 and 15 others, 22 August 2013

seasonal nature of agricultural work where there are high labour demands at particular times of the year, but low levels of demand for the remainder of the year. This makes the commitment to a minimum 12 month arrangement hard to meet for many farm businesses, particularly when it is difficult to terminate if circumstances change.

For trainees, paperwork, costs of training and distance between towns and farms make access to formal training programs more difficult. Trainees often require accommodation or transportation to the farm, and may struggle to meet these costs from their own wages. A lack of awareness of opportunities is also a contributing factor, as is the fact that many trainees are too young to hold a drivers licence or do not have access to a vehicle. Further research into these factors and potential mechanisms to overcome barriers to apprenticeship and traineeship arrangements would be of significant benefit to the agriculture industry.

6. Repairing Awards

The NFF supports draft recommendation 12.1.

In our initial submission to this inquiry, the NFF called for an end to the four yearly modern award review process, which is long and resource intensive, and unlikely to enhance productivity or efficiency. The enormity of the task means that modern awards will remain in a perpetual state of statutory review, requiring constant allocation resources from all stakeholders representing all award covered employers and employees in Australia.

The process is described as a ‘regulatory review’, but largely relies on a process developed over many years to resolve industrial disputes within the limits identified by the parties. As a new process, it is not yet entirely clear where the limits of discretion lie, and this makes it difficult for stakeholders to participate effectively in the review.

The proposed alternative approach, which would replace the 4 yearly review with a new, 3 Stream process, has the benefit of ensuring the cost-benefit analysis of change is undertaken before a wide stakeholder consultation phase is initiated. This would go some way to addressing concerns about the relevance of the current, adversarial style process to the modern award review. However, it may be worth considering whether the shift in constitutional underpinnings (away from the conciliation and arbitration power to a combination of the corporations and referrals powers) affects the capacity of the Commission to determine changes in workplace law.

We strongly support legislative change in relation to the modern awards objective (specifically, section 134(1)(da) of the FW Act). It remains to be seen how the Commission will deal with specific claims for higher wages relying on this provision. For example, employers in the horticulture industry currently face a claim to extend overtime to casual employees for the first time, largely in reliance on the provision). If successful, the claim will have a dampening effect on economic activity in the agriculture sector by significantly increasing harvest labour costs around Australia.

INFORMATION REQUEST

The Productivity Commission seeks views on whether there is scope to include preferred hours clauses in awards beyond the current narrow arrangements, including the scope for an arrangement where an employer would be obliged to pay penalty rates when it requested an employee to work at an employee's non-preferred time in the employment contract.

What would the risks of any such 'penalty rate' agreements be and how could these be mitigated?

The NFF considers that preferred hours arrangements can be adopted in a way that promotes greater workplace flexibility and with appropriate safeguards. Employers and employees need to be able to tailor working arrangements that suit them if they are to find the most productive ways of working. The Commission has traditionally taken a very dim view of the arrangements because of the potential for them to be misused to the detriment of the employee. In our view, there is no reason why appropriate safeguards cannot be adopted to facilitate preferred hours arrangements so that they can be made when it is a win-win for both parties.

Individual flexibility arrangements do not provide appropriate scope for dealing with employee preference of hours, both due to the application of the better off overall test (BOOT) and lack of clarity over the meaning of 'non-monetary benefits'.

7. Enterprise Bargaining

As discussed in our initial submission to this inquiry, enterprise bargaining is not widespread in the agriculture sector, a factor which is at least partly explained by the high incidence of small business. In our view, this is also related to the fact that we now have a comprehensive legislative safety net (the NES and modern awards) and enterprise bargaining which gives primacy to improving the position of employees through the BOOT rather than tailoring workplace conditions to suit.

The NFF supports draft recommendation 15.1.

While procedural requirements have an important role, they should triumph over an agreed outcome of benefit to concerned, particularly where the defect is only minor and does not materially affect the bargaining process or rights of the parties.

The NFF agrees that ‘the key test for exercising discretion should be that the Commission is satisfied that employees were not likely to have been placed at a disadvantage during bargaining or the pre-approval process because of the unmet requirement.’²²

Greater transparency through published guidelines may be of assistance as long as they are not themselves treated as codified requirements.

Cases such as the ‘staple case’²³ highlight the ridiculous outcomes that can result from overly prescriptive form or content requirements. Such an approach obtains no real benefit in relation to the fairness of agreement making process, but it does impose higher costs on the parties as they are required to start all over again in the unfortunate event that a procedural defect is identified.

INFORMATION REQUEST

The Productivity Commission seeks feedback on whether there is a mechanism that would only restrain pattern bargaining:

- ***where it is imposed through excessive leverage or is likely to be anticompetitive***
- ***while allowing it in circumstances where it is conducive to low transaction cost agreements that parties genuinely consent to.***

²² Productivity Commission Draft Report into the Workplace Relations Framework, p.554

²³ *Peabody Moorvale Pty Ltd v Construction, Forestry, Mining and Energy Union* [2014] FWCFCB 2042.

The NFF maintains that pattern bargaining should be restricted generally, not only in connection with the taking of protected industrial action but to all bargaining related activity. This view rests on an understanding that the pattern bargaining does not include conduct where there is a preparedness to bargain over terms.²⁴

Enterprise bargaining is best placed to achieve productivity improvements if workplace relations arrangements are tailored to the particular workplace concerned. Non-negotiable template agreements undermine enterprise bargaining, increase costs and taint perceptions about the validity of bargaining. They impose uniform, often unaffordable, terms and conditions on small business and deter workplace bargaining where unsuitable agreements have already been adopted.

The current approach where pattern bargaining is only relevant to whether industrial action is prohibited is too narrow. Far more employers will experience pattern bargaining than industrial action. Restricting pattern bargaining generally will not limit the ability of employers to agree to uniform terms or standards, as long as parties are willing to negotiate during bargaining.²⁵

Individual flexibility arrangements

The NFF supports draft recommendation 15.2.

Individual flexibility arrangements (IFAs) play an important role in delivering on the individual needs of employers and employees. They ought to be able to be made as a condition of employment, and IFAs made under enterprise agreements should permit the same level of flexibility as that provided by the model flexibility term. The 2012 post-implementation review of the FW Act²⁶ (the 2012 review) raised this issue and made the same recommendation. In that review, the Panel found that in many cases flexibility terms in enterprise agreements are restricting the number of matters over which an IFA may be made to below that provided for in the model term²⁷, and that unions had actively campaigned to frustrate the take up of

²⁴ FW Act, s.412(3)(a).

²⁵ *Australian Nursing Federation v Tweddle Child and Family Health Service and Others* [2007] AIRC 862; *Australian Nursing Federation v Trinity Garden Aged Care Anzac Lodge Private Nursing Home* (2006) PR973718.

²⁶ McCallum, Moore and Edwards (2012) *Toward More Productive and Equitable Workplaces: an evaluation of the Fair Work Legislation*, Australian Government.

²⁷ *Ibid*, 164.

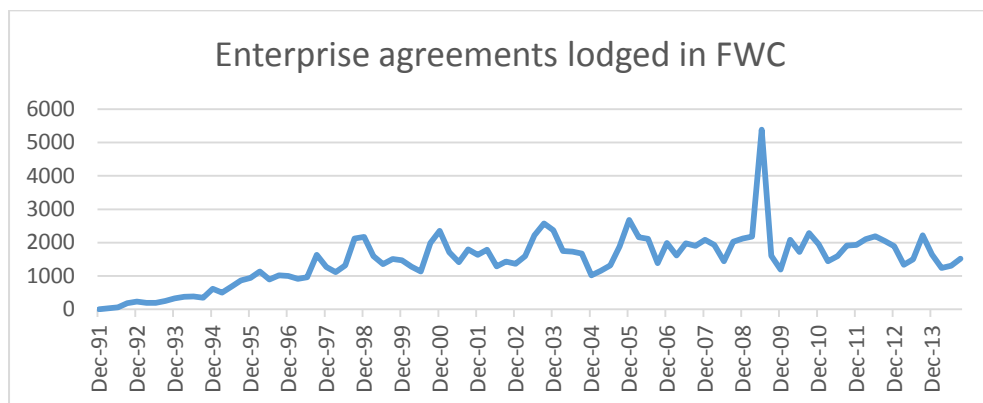
IFAs by refusing to agree to flexibility terms that operate in respect of more than a small number of relatively insignificant matters.²⁸

A new no-disadvantage test

The NFF supports draft recommendation 15.4.

The better off overall test (BOOT) sets the standard of approval for an enterprise agreement too high. Enterprise bargaining in Australia has long been seen as a means of lifting productivity by tailoring employment conditions to the particular needs of the workplace or business.²⁹ The BOOT undermines this by removing focus from productivity and innovation. There has been a slow decline in the number of enterprise agreements overall, as the table below shows.

In the 2012 review, employers and employees were found to have negotiated enterprise agreements believing that they would increase productivity only to have them rejected by FWA because they did not meet the BOOT, such as retailers having to roster staff on days and hours they do not prefer in order to meet the requirements of the BOOT.³⁰



Department of Employment *Trends in Federal Enterprise Bargaining, Historical table: All wage agreements, by ANZSIC division, lodged in the quarter: December quarter 1991 - June quarter 2014*³¹

²⁸ Ibid, 163.

²⁹ The objects of Part 2-4 of the FW Act include “to provide a simple, flexible and fair framework that enables collective bargaining in good faith, particularly at the enterprise level, for enterprise agreements that deliver productivity benefits”.

³⁰ McCallum, Moore and Edwards (2012), 83.

³¹ The spike in the June 2009 quarter coincides with the imminent commencement of the FW Act, when a record 5386 agreements were lodged in the quarter.

The language of section 193(1) requiring that *each* employee be better off overall under the test is inconsistent with guidance in the Explanatory Memorandum to the Fair Work Bill 2008 which states:

‘although the better off overall test requires FWA to be satisfied that each award covered employee and each prospective award covered employee will be better off overall, it is intended that FWA will generally be able to apply the better off overall test to classes of employees. In the context of the approval of enterprise agreements, the better off overall test does not require FWA to enquire into each employee’s individual circumstances.’³²

Such an inconsistency should be reconciled.

Further the application of the BOOT using a line by line consideration rather than a global assessment limits is contrary to the underlying purpose of enterprise agreements to improve productivity and innovation. There may be circumstances where it is appropriate for an employee to exchange their entitlements under one award condition, for other entitlements that will not lead to disadvantage. As the Productivity Commission notes, the FWC benchbook indicates that a line-by-line approach to the test is not appropriate, approved in *AKN Pty Ltd v t/a Aitkin Crane Services*.³³

The BOOT test is difficult to understand and apply, both for members of the Commission and for stakeholders. There is no strong policy rationale for departing from the long standing ‘no disadvantage test’ (which except for a brief period from 2006 – 2008, had applied under the *Workplace Relations Act 1996* and predecessor legislation for many years.

The no disadvantage test adopted a global, rather than line by line consideration of employee terms and conditions in the proposed agreement.³⁴ In our view, the approach taken in *Re McDonalds Australia Pty Ltd* (2010) 196 IR 155 provides useful guidance. In that case, a Full Bench of the Commission adopted the following approach:

³² *Fair Work Bill 2008*, Explanatory Memorandum, The Parliament of the Commonwealth of Australia, House of Representatives, 128.

³³ [2015] FWCFB 1833.

³⁴ Richard Naughton (1997) ‘New Approaches to the Vetting of Agreements’ *New Rights and Remedies for Individual Employees: Implications for Employers and Unions*, 5th Annual Labour Law Conference Proceedings, Working Paper 48, 19.

- assess the agreement against the relevant modern award or modern enterprise award (and not the NES);
- consider any changes in employee entitlements as a whole;
- give balanced consideration to advantages conferred by the agreement, weighed against potential disadvantages;
- consider any disadvantages in context, having regard to the proportion of employees actually affected, and the reasons for the proposed change; and
- determine whether, overall, there will be a reduction in terms and conditions of employment for the group of employees who will be covered by the agreement.

The test would be applied at the time of approval of the enterprise agreement. It would renew the emphasis on enterprise bargaining, consistent with the objects of the FW Act, because it would restore the focus on both productivity and fairness in the bargaining context.

Bargaining representatives

The NFF supports recommendation 15.5.

In circumstances where there is no union member, we recommend that the necessary proportion of employees represented by a nominated bargaining representative be 10 per cent of those who will be covered by the proposed agreement. Non-union representatives may have the best of intentions, but the more of them there are, the more complex bargaining becomes, which means a greater allocation of resources to manage the process than should reasonably be required.

A no disadvantage test for IFAs

The NFF supports draft recommendation 16.2. A new no-disadvantage test should replace the BOOT for IFAs, which has created much uncertainty over how non-monetary benefits are to be treated, and reduced the value proposition for making IFAs.

We recognise the merits of consistency in a single approach to dealing both with assessment of enterprise agreements and IFAs. However, IFAs are different, in that they apply to a single employee, and they permit the consideration of

non-monetary benefits. In our view, the approach suggested above for enterprise agreements could apply to IFAs, but tailored to reflect these differences.

8. The Enterprise Contract

INFORMATION REQUEST

The Productivity Commission seeks information on the costs (including compliance costs) and benefits of an enterprise contract to employers, employees and to regulatory agencies. Particular areas that the Commission seeks information on are:

- *additional evidence on the potential gap in contract arrangements between individual arrangements (broadly defined) and enterprise agreements*
- *the extent to which the enterprise contract would be a suitable addition to the current suite of employment arrangements, how it could fill the gap identified, and specific examples of where and how it could be utilised*
- *clauses that could be included in the template arrangement*
- *possible periods of operation and termination*
- *the advantages and disadvantages of the proposed opt in and opt out arrangements.*

In addition, the Productivity Commission invites participants' views on the possible compliance and implementation arrangements suggested in this chapter, such as their impact on employers, employees and regulatory agencies.

The NFF supports the concept of a new 'enterprise contract', including the various safeguards to ensure that the contract works for both the employer and employees.

As noted in the draft report, employers in small and medium sized businesses often find the prospect of enterprise bargaining daunting, and for many it is difficult to justify the cost. However, it is common for common law contracts to seek to simplify the administration of workplace terms and conditions (for example, by aggregating award entitlements into an annual salary).

In the farm sector, enterprise contracts could provide a useful mechanism for dealing with the minimum engagement period in the dairy industry. In smaller dairies, a standard contract tailored to the workplace which does not disadvantage any employee but provides certainty as to the rules that apply in a low cost, easy to access format, would be of significant value.

A number of employment contract templates are currently made available for use in the dairy industry are found in the People in Dairy website.³⁵ The website also includes a Generator, through which standard form template arrangements can be

³⁵ <http://www.thepeopleindairy.org.au/engagement-reward/contracts-and-agreements.htm>

built (for example, job descriptions and safety tools). A similar approach could be adopted in relation to enterprise contract templates.

9. Industrial disputes and right of entry

The NFF supports draft recommendation 19.1, subject to our view that majority support determinations should no longer form part of the FW Act for the reasons outlined in our initial submission.

The draft recommendation is similar in effect to the ‘JJ Richards’ recommendation made arising from the 2012 Review (at recommendation 31) and Item 56 of the *Fair Work Amendment Bill 2014* (currently being debated in the Senate). It should be adopted without delay.

In relation to majority support determinations, we maintain the view that compelling a party to bargain without their consent will not deliver productive, efficient or fair outcomes, because the legitimacy of bargaining process is in question from the outset. Overriding the voluntary nature of collective bargaining infringes the right to freedom of association. Majority support determinations, and other mechanisms that compel a party to bargain for an agreement they do not want, should be removed from the FW Act.

INFORMATION REQUEST

The Productivity Commission seeks further input from stakeholders on how protected action ballot procedures may be simplified to reduce compliance costs, while retaining the benefits of secret ballots. Potential simplifications include:

- removing the requirement that a protected action ballot specify the types of actions to be voted on by employees, and instead simply requiring a vote in favour of any forms of protected industrial action***
- amending or removing the requirement that industrial action be taken within 30 days of ballot results being declared***
- granting the Fair Work Commission the discretion to overlook minor procedural defects when determining if protected industrial action is authorised by a ballot.***

There is no doubt that the process for administering protected action ballots is overly complex. There are legitimate reasons for this, including the need to ensure employees only vote once, and that the threat of industrial action has a limited lifespan.

Simplifying the rules around who is entitled to vote in, and take, industrial action, may go some way to alleviating the compliance burden on industrial action. The Australian Electoral Commission may be well placed to provide advice on which

procedural requirements are essential to the conduct of a secret ballot, with a view to streamlining some of the statutory requirements.

Notified industrial action needs to be taken with a specified timeframe. Rather than extending this period, an option might be to consider a shorter period than 30 days. This could reduce the incidence of protected action ballots being sought as an insurance strategy in negotiations and instead encourage their use only when action is actually likely to be taken because the parties have reached an impasse.

Minor procedural defects could be waived as long as this did not adversely affect the employer's capacity to mitigate the effects of notified industrial action.

INFORMATION REQUEST

The Productivity Commission seeks further input from stakeholders on how 'significant harm' should be defined when the Fair Work Commission is deciding whether to exercise its powers under s. 423 and s. 426 of the Fair Work Act 2009 (Cth).

The NFF agrees that the threshold is currently set too high for accessing orders under sections 423 and 426 of the FW Act. The problem appears to lie, not with the FW Act, but with the current interpretation of the term "significant".

As Minter Ellison submitted to the inquiry, "significant" bears its ordinary meaning and it should be interpreted in that way. This could be addressed in the FW Act by clarifying the meaning of the term – for example, a new subsection to the effect that harm can be significant even if it is harm that might ordinarily be expected to flow from industrial action in a similar context. The Commission would still have to be satisfied that the making of orders was appropriate in the circumstances.

INFORMATION REQUEST

The Productivity Commission seeks further feedback from inquiry participants on what forms of more graduated employer industrial action should be permitted, and how these should be defined in statute.

The current situation whereby protected industrial action by employers is limited to a lockout in response to protected industrial action by employees is unsatisfactory. Employers require a number of graduated response actions that do not involve a lockout. This could include the ability to reduce or vary hours of work or withdraw rostered overtime, restrict duties or cease providing benefits

over and above the NES. In each case, these would provide a less dramatic form of response to industrial action taken by employees.

10. Migrant Workers

Overseas workers often fill essential on-farm roles that cannot be filled from the domestic labour force. While the industry invests heavily in programs to recruit, train and retain Australian workers, closing the gap from the local workforce will never be fully realised. High rates of youth unemployment in areas where tourism and agriculture are key industries suggests that complementarity of entry-level work and entry-level workers will not always resolve labour shortages in isolation. A coordinated effort is required to deliver greater investment in skills, attract more people to work in sectors of the economy where labour shortages exist and rebalance the workplace relations framework in a way that delivers productivity benefits across the economy.

The NFF has been actively involved in examining measures to ensure that overseas workers are treated well while working on Australian farms, and recently endorsed new Sustainable Guiding Principles for Agricultural Employment and Agricultural Labour Contracting. These Principles provide a new base from which to build capacity in the sector, to reduce the incidence of underpayment or other unlawful conduct, and drive the social license of agriculture in the employment context.

The NFF supports a new allocation of resources to support more in-depth engagement with the agriculture sector on employment of overseas workers, including in partnership with the NFF. While investigation of concerns and audits are important in many cases, the value of education and collaboration to lift compliance where gaps are identified should not be underestimated.

The NFF would be concerned about the extension of a new FW Act-based penalties regime for overseas workers, because of the effect of Employer Sanctions legislation, where farmers are held liable for the migration-related breaches of their contractors. The NFF would not support any regime which made farmers liable for the FW Act breaches of other employers.

11. Conclusion

A flexible and skilled workforce is critical to productivity. The current workplace relations framework is comprehensive and broad in reach. While it is not systematically dysfunctional, there are a number of elements of the scheme that require reform.

For many farm businesses, labour is their single biggest cost. Thriving in an increasingly global and competitive marketplace requires the ability to adapt as things change. Undue restraints on business decision-making impede growth and innovation, while complexity drives up compliance costs. These issues need to be addressed to support the future competitiveness of the agriculture sector and the Australian economy.

The Productivity Commission's draft report is an important step toward a framework that can rebalance workplace relations so that they are fair, both for employers and employees, and conducive to productivity. The NFF thanks the Productivity Commission for its in-depth analysis of the framework, and its considered approach to what is a wide-ranging and complex area of law, affecting almost every Australian workplace participant.

Attachment A: Summary of Responses

Recommendation		NFF Position
3.1	The Australian Government should amend the Fair Work Act 2009 (Cth) to establish a Minimum Standards Division as part of the Fair Work Commission. This Division would have responsibility for minimum wages and modern awards. All other functions of the Fair Work Commission should remain in a Tribunal Division.	Support
3.2	<p>The Australian Government should amend s. 629 of the Fair Work Act 2009 (Cth) to stipulate that new appointments of the President, Vice Presidents, Deputy Presidents and Commissioners of the Fair Work Commission be for periods of five years, with the possibility of reappointment at the end of this period, subject to a merit-based performance review undertaken jointly by an independent expert appointment panel and (excepting with regard to their own appointment) the President.</p> <p>Current non-judicial Members should also be subject to a performance review based on the duration of their current appointment. Existing Members with five or more years of service would be subject to review within three years from the commencement of these appointment processes with reviews to be staggered to reduce disruption. Non-judicial Members with fewer than five years of service would be reviewed at between three to five years, depending on the date of their appointment.</p>	<p>Support. Recommend consideration of the existing process for AHRC Commissioners.</p> <p>Caution against too much emphasis on performance management if fixed appointments are introduced.</p>
3.3	<p>The Australian Government should amend the Fair Work Act 2009 (Cth) to change the appointment processes for Members of the Fair Work Commission. The amendments would stipulate that:</p> <ul style="list-style-type: none"> • an independent expert appointment panel should be established by the Australian Government and state and territory governments • members of the appointment panel should not have had previous direct roles in industrial 	Support.

	<p>representation or advocacy</p> <ul style="list-style-type: none"> • the panel should make a shortlist of suitable candidates for Members of the Fair Work Commission against the criteria in draft recommendation 3.4 • the Commonwealth Minister for Employment should select Members of the Fair Work Commission from the panel's shortlist, with appointments then made by the Governor General. 	
3.4	<p>The Australian Government should amend the Fair Work Act 2009 (Cth) to establish separate eligibility criteria for members of the two Divisions of the Fair Work Commission outlined in draft recommendation 3.1.</p> <p>Members of the Minimum Standards Division should have well-developed analytical capabilities and experience in economics, social science, commerce or equivalent disciplines.</p> <p>Members of the Tribunal Division Membership should have a broad experience, and be drawn from a range of professions, including (for example) from ombudsman's offices, commercial dispute resolution, law, economics and other relevant professions.</p> <p>A requirement for the Panel and the Minister for Employment respectively is that they be satisfied that a person recommended for appointment would be widely seen as having an unbiased and credible framework for reaching conclusions and determinations in relation to workplace relation matters or other relevant areas.</p>	Support.
3.5	<p>The Australian Government should require that the Fair Work Commission publish more detailed information about conciliation outcomes and processes. In the medium term, it should also commission an independent performance review of the Fair Work Commission's conciliation processes, and the outcomes that result from these processes.</p>	Support.
4.1	<p>The Fair Work Commission should, as a part of the current four yearly review of modern awards, give effect to s. 115(3) of the Fair Work Act 2009 (Cth) by incorporating terms that permit an employer and an employee to agree to substitute a public holiday for an alternative day into all</p>	Support, as long as substitution arrangements are voluntary and without conditions on the right to

	modern awards.	approve or refuse a proposed substitution arrangement.
4.2	The Australian Government should amend the National Employment Standards so that employers are not required to pay for leave or any additional penalty rates for any newly designated state and territory public holidays.	Support.
4.3	Periodically, the Australian, state and territory governments should jointly examine whether there are any grounds for extending the existing 20 days of paid annual leave in the National Employment Standards, with a cash out option for any additional leave where that suits the employer and employee. Such an extension should not be implemented in the near future, and if ultimately implemented, should be achieved through a negotiated tradeoff between wage increases and extra paid leave.	Support measures to improve flexibility by agreement and where labour costs are not increased overall.
5.1	The Australian Government should either provide the Fair Work Commission with greater discretion to consider unfair dismissal applications ‘on the papers’, prior to commencement of conciliation; or alternatively, introduce more merit focused conciliation processes.	Support.
5.2	The Australian Government should change the penalty regime for unfair dismissal cases so that: <ul style="list-style-type: none"> • an employee can only receive compensation when they have been dismissed without reasonable evidence of persistent underperformance or serious misconduct • procedural errors by an employer should not result in reinstatement or compensation for a former employee, but can, at the discretion of the Fair Work Commission, lead to either counselling and education of the employer, or financial penalties. 	Support, and propose greater practical emphasis on costs regime and option of security for costs as opposed to higher lodgement fees.
5.3	The Australian Government should remove the emphasis on reinstatement as the primary goal of the unfair dismissal provisions in the Fair Work Act 2009 (Cth).	Support.
5.4	Conditional on implementation of the other recommended changes to the unfair dismissal system within this report, the Australian Government should remove the (partial) reliance on the Small	Oppose. The Fair Dismissal Code has made

	Business Fair Dismissal Code within the Fair Work Act 2009 (Cth).	conducting a fair termination process much more manageable for small business.
6.1	The Australian Government should amend the Fair Work Act 2009 (Cth) to formally align the discovery processes used in general protection cases with those provided in the Federal Court's Rules and Practice Note 5 CM5.	Support.
6.2	<p>The Australian Government should modify s. 341 of the Fair Work Act 2009 (Cth), which deals with the meaning and application of a workplace right.</p> <ul style="list-style-type: none"> • Modified provisions should more clearly define how the exercise of a workplace right applies in instances where the complaint or inquiry is indirectly related to the person's employment. • The FW Act should also require that complaints are made in good faith; and that the Fair Work Commission must decide this via a preliminary interview with the complainant before the action can proceed and prior to the convening of any conference involving both parties. 	Support.
6.3	The Australian Government should amend Part 3-1 of the Fair Work Act 2009 (Cth) to introduce exclusions for complaints that are frivolous and vexatious.	Support.
6.4	The Australian Government should introduce a cap on compensation for claims lodged under Part 3-1 of the Fair Work Act 2009 (Cth).	Support a cap in line with the compensation cap for unfair dismissal.
6.5	The Australian Government should amend Schedule 5.2 of the Fair Work Regulations 2009 (Cth) to require the Fair Work Commission to report more information about general protections matters. Adequate resourcing should be provided to the Fair Work Commission to improve its data collection and reporting processes in this area.	Support.
8.1	In making its annual national wage decision, the Fair Work Commission should broaden its analytical framework to systematically consider the risks of unexpected variations in economic	Support.

	circumstances on employment and the living standards of the low paid.	
9.1	The Australian Government should amend the Fair Work Act 2009 (Cth) so that the Fair Work Commission is empowered to make temporary variations in awards in exceptional circumstances after an annual wage review has been completed.	Support.
9.2	<p>The Australian Government should commission a comprehensive review into Australia's apprenticeship and traineeship arrangements. The review should include, but not be limited to, an assessment of:</p> <ul style="list-style-type: none"> • the role of the current system within the broader set of arrangements for skill formation • the structure of awards for apprentices and trainees, including junior and adult training wages and the adoption of competency-based pay progression • the factors that affect the supply and demand for apprenticeships and traineeships, including the appropriate design and level of government, employer and employee incentives. 	Support.
12.1	<p>The Australian Government should amend the Fair Work Act 2009 (Cth) to:</p> <ul style="list-style-type: none"> • remove the requirement for the Fair Work Commission to conduct four yearly reviews of modern awards • add the requirement that the Minimum Standards Division of the Fair Work Commission review and vary awards as necessary to meet the Modern Awards Objective. <p>To achieve the goal of continuously improving awards' capability to meet the Modern Awards Objective, the legislation should require that the Minimum Standards Division:</p> <ul style="list-style-type: none"> • use robust analysis to set issues for assessment, prioritised on the basis of likely high yielding gains • obtain public guidance on reform options. 	Support.
12.2	The Australian Government should amend the Fair Work Act 2009 (Cth) so that the Minimum	Support.

	Standards Division of the Fair Work Commission has the same power to adjust minimum wages in an assessment of modern awards as the minimum wage panel currently has in annual wage reviews.	
14.1	Sunday penalty rates that are not part of overtime or shift work should be set at Saturday rates for the hospitality, entertainment, retail, restaurants and cafe industries. Weekend penalty rates should be set to achieve greater consistency between the hospitality, entertainment, retail, restaurants and cafe industries, but without the expectation of a single rate across all of them. Unless there is a clear rationale for departing from this principle, weekend penalty rates for casuals in these industries should be set so that they provide neutral incentives to employ casuals over permanent employees.	Support.
14.2	The Fair Work Commission should, as part of its current award review process, introduce new regulated penalty rates as set out in draft recommendation 14.1 in one step, but with one year's advance notice.	Support.
15.1	<p>The Australian Government should amend Division 4 of Part 2-4 of the Fair Work Act 2009 (Cth) to:</p> <ul style="list-style-type: none"> • allow the Fair Work Commission wider discretion to approve an agreement without amendment or undertakings as long as it is satisfied that the employees were not likely to have been placed at a disadvantage because of the unmet requirement. • extend the scope of this discretion to include any unmet requirements or defects relating to the issuing or content of a notice of employee representational rights. 	Support.
15.2	The Australian Government should amend s. 203 of the Fair Work Act 2009 (Cth) to require enterprise flexibility terms to permit individual flexibility arrangements to deal with all the matters listed in the model flexibility term, along with any additional matters agreed by the parties. Enterprise agreements should not be able to restrict the terms of individual flexibility arrangements.	Support.
15.3	The Australian Government should amend s. 186(5) of the Fair Work Act 2009 (Cth) to allow an	Support.

	<p>enterprise agreement to specify a nominal expiry date that:</p> <ul style="list-style-type: none"> • can be up to five years after the day on which the Fair Work Commission approves the agreement, or • matches the life of a greenfields project. The resulting enterprise agreement could exceed five years, but where so, the business would have to satisfy the Fair Work Commission that the longer period was justified. 	
15.4	<p>The Australian Government should amend the Fair Work Act 2009 (Cth) to replace the better off overall test for approval of enterprise agreements with a new no-disadvantage test. The test against which a new agreement is judged should be applied across a like class (or series of classes) of employees for an enterprise agreement. The Fair Work Commission should provide its members with guidelines on how the new test should be applied.</p>	<p>Support and propose a new test modelled on the decision in <i>Re McDonalds Australia</i> (2010) 196 IR 155</p>
15.5	<p>The Australian Government should amend the Fair Work Act 2009 (Cth) so that:</p> <ul style="list-style-type: none"> • a bargaining notice specifies a reasonable period in which nominations to be a bargaining representative must be submitted • a person could only be a bargaining representative if they represent a registered trade union with at least one member covered by the proposed agreement, or if they were able to indicate that at least 5 per cent of the employees to be covered by the agreement nominated them as a representative. 	<p>Support, but consider that bargaining representatives should be required to represent at least 10 per cent of affected employees.</p>
15.6	<p>The Australian Government should amend the rules around greenfields agreements in the Fair Work Act 2009 (Cth) so that bargaining representatives for greenfields agreements are subject to the good faith bargaining requirements.</p>	<p>Support on the basis that there is a clear capacity for withdrawal from negotiations without breaching good faith bargaining requirements.</p>

15.7	<p>The Australian Government should amend the Fair Work Act 2009 (Cth) so that if an employer and union have not reached a negotiated outcome for a greenfields agreement after three months, the employer may (as illustrated in figure 15.5):</p> <ul style="list-style-type: none"> • continue negotiating with the union • request that the Fair Work Commission undertake ‘last offer’ arbitration of an outcome by choosing between the last offers made by the employer and the union • submit the employer’s proposed greenfields arrangement for approval with a 12 month nominal expiry date. <p>Regardless of the agreement-making process chosen by the employer, the ensuing greenfields arrangement must pass the proposed no-disadvantage test.</p>	Support.
16.1	<p>The Australian Government should amend the Fair Work Act 2009 (Cth) so that the flexibility term in a modern award or enterprise agreement can permit written notice of termination of an individual flexibility arrangement by either party to be a maximum of 1 year. The Act should specify that the default termination notice period should be 13 weeks, but in the negotiation of an agreement, employers and employees could agree to extend this up to the new maximum.</p>	Support.
16.2	<p>The Australian Government should amend the Fair Work Act 2009 (Cth) to introduce a new ‘no-disadvantage test’ (NDT) to replace the better off overall test for assessment of individual flexibility arrangements. The guidance in implementing the new NDT should also extend to collective agreements (as recommended in draft recommendation 15.4).</p> <p>To encourage compliance the Fair Work Ombudsman should:</p> <ul style="list-style-type: none"> • provide more detailed guidance for employees and employers on the characteristics of an individual flexibility arrangement that satisfies the new NDT, including template arrangements • examine the feasibility, benefits and costs of upgrading its website to provide a platform to assist employers and employees to assess whether the terms proposed in an individual flexibility 	Support.

	arrangement satisfy a NDT.	
16.3	The Fair Work Ombudsman should develop an information package on individual flexibility arrangements and distribute it to employers, particularly small businesses, with the objective of increasing employer and employee awareness of individual flexibility arrangements. It should also distribute the package to the proposed Australian Small Business and Family Enterprise Ombudsman, the various state government offices of small business, major industry associations and employee representatives.	Support.
19.1	The Australian Government should amend s. 443 of the Fair Work Act 2009 (Cth), clarifying that the Fair Work Commission should only grant a protected action ballot order to employees once it is satisfied that enterprise bargaining has commenced, either by mutual consent or by a Majority Support Determination.	Support but consider that majority support determinations provisions should be repealed.
19.2	The Australian Government should amend s. 423(2) of the Fair Work Act 2009 (Cth) such that the Fair Work Commission may suspend or terminate industrial action where it is causing, or threatening to cause, significant economic harm to the employer or the employees who will be covered by the agreement, rather than both parties (as is currently the case).	Support.
19.3	The Australian Government should amend the Fair Work Act 2009 (Cth) so that where a group of employees have withdrawn notice of industrial action, employers that have implemented a reasonable contingency plan in response to the notice of industrial action may stand down the relevant employees, without pay, for the duration of the employer's contingency response.	Support.
19.4	The Australian Government should amend the Fair Work Act 2009 (Cth) to grant the Fair Work Commission the discretion to withhold a protected action ballot order for up to 90 days, where it is satisfied that the group of employees has previously used repeated withdrawals of protected action, without the agreement of the employer, as an industrial tactic.	Support.
19.5	The Australian Government should amend the Fair Work Act 2009 (Cth) so that where employees engage in brief work stoppages that last less than the shortest time increment used by	Support a permissible deduction of 15 minutes and employer choice in

	<p>their employer for payroll purposes, the employer should be permitted to choose to either:</p> <ul style="list-style-type: none"> • deduct the full duration of the increment from employee wages. The maximum permissible deduction under this provision would be 15 minutes per person, or • pay employees for the brief period of industrial action, if the employer is willingly doing so to avoid the administrative costs of complying with prohibitions on strike pay. 	that scenario.
19.6	The Australian Government should increase the maximum ceiling of penalties for unlawful industrial action to a level that allows federal law courts the discretion to impose penalties that can better reflect the high costs that such actions can inflict on employers and the community.	Support.
19.7	<p>The Australian Government should amend s. 505A of the Fair Work Act 2009 (Cth) for determining when the Fair Work Commission may make an order to deal with a dispute about frequency of entry by an employee representative to:</p> <ul style="list-style-type: none"> • repeal the requirement under s. 505A(4) that the frequency of entry would require an unreasonable diversion of the occupier's critical resources • require the Fair Work Commission to take into account: <ul style="list-style-type: none"> – the combined impact on an employer's operations of entries onto the premises – the likely benefit to employees of further entries onto the premises – the employee representative's reason(s) for the frequency of entries. 	Support.
19.8	The Australian Government should amend the Fair Work Act 2009 (Cth) so that unions that do not have members employed at the workplace and are not covered by (or are not currently negotiating) an agreement at the workplace, would only have a right of entry for discussion purposes on up to two occasions every 90 days.	Support.
20.1	Terms that restrict the engagement of independent contractors, labour hire and casual workers, or regulate the terms of their engagement, should constitute unlawful terms under the Fair Work Act	Support.

	2009 (Cth).	
21.1	<p>The Fair Work Ombudsman should be given additional resources for investigation and audits of employers suspected of underpaying migrant workers (including those in breach of the Migration Act 1958 (Cth)).</p> <p>The Migration Act should be amended so that employers can be fined by at least the value of any unpaid wages and conditions to migrants working in breach of the Migration Act, in addition to the existing penalties under the Act.</p>	<p>Encourage greater emphasis on education and collaboration to lift compliance.</p> <p>Do not support any extension of liability of third parties for contractor breaches.</p>
22.1	The Australian Government should amend the Fair Work Act 2009 (Cth) so that an employee's terms and conditions of employment would not transfer to their new employment when the change was at his or her own instigation.	Support.